ORIGINAL DOCKET FILE COPY ORIGINAL

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

November 23, 1993

IN REPLY PLEASE
REFER TO OUR FILE

RECEIVED
NOV 23 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Hand Delivered

Re: In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252

Dear Secretary Caton:

Enclosed please find an original and four (4) copies of the Reply Comments of the Pennsylvania Public Utility Commission in the above-captioned matter.

Sincerely,

Maureen A. Scott

Maureen A. Scott
Assistant Counsel

For the Pennsylvania Public Utility Commission

MAS/ms
Enclosure

cc: Per Certificate of Service

No. of Copies rec'd 0+4
List ABCDE

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

REPLY COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Pennsylvania Public Utility Commission ("PaPUC") is the state agency responsible for regulating all public utilities, including telephone companies, within the Commonwealth of Pennsylvania. As such, it has a significant interest in the regulation of telecommunications services at both the interstate and intrastate levels. In pursuit of that interest, the PaPUC submits the following reply comments in accordance with the pleading cycle established in this proceeding.

I. INTRODUCTION

The Omnibus Budget Reconciliation Act of 1993 ("Act") amends Sections 3(n) and 332 of the Communications Act of 1934 to create a comprehensive framework for the regulation of mobile radio services. The primary purpose of Section 5205 of the Act is to achieve regulatory parity among substantially similar services.[1]

The Federal Communications Commission ("FCC") initiated

[1]House Report at 259.

this Notice of Proposed Rulemaking ("NPRM" or 'Notice") to seek comment on (1) the definitional issues raised by the Budget Act; (2) identify various services, including PCS, affected by the new legislation and describe the potential regulatory treatment thereof; and (3) delineate the provisions of Title II of the Communications Act that will be applied to commercial mobile services and those provisions that will be forborne.[2]

The PaPUC agrees with the majority of commenters that the term "commercial mobile service" should be defined broadly in order to achieve Congress' intent to establish regulatory parity among like services. For this same reason, PCS should be classified as a commercial mobile service with redesignation of the spectrum for private applications when it is determined to be in the public interest. The record of this proceeding does not support forbearance of tariff regulation for all commercial mobile service providers. Forbearance should be analyzed on a service-by-service basis consistent with Congressional intent. As discussed further in Section II.D. infra., the PaPUC does not believe that preemption of state interconnection policies and rates is either warranted or supported by the Act. Finally, state petitions should be reviewed on a case-by-case basis and should not be subject to threshold criteria or other stringent requirements, which are not supported by either the Act or its legislative history.

II. DISCUSSION

Consistent with the initial comments of most parties, the

---

[2] Notice, para. 2.

PaPUC agrees with the FCC's decision to include all existing mobile services within the ambit of revised Section 332, including Part 22 public mobile services, Part 25 mobile satellite services, Part 90 private land mobile services, Parts 80 and 87 mobile marine and aviation services, and Part 95 personal radio services. This interpretation comports with both the plain language of the Act and Congressional intent as determined through the Act's legislative history. The amendment to the definition of "mobile service" under Section 3(n) was meant for clarification purposes rather than to exclude service categories not listed.[3] This tentative conclusion is also consistent with Congressional intent to introduce consistent regulatory treatment among all mobile services.

A. Commercial Mobile Service Should Be Defined Broadly Consistent With Congressional Intent To Achieve Regulatory Parity Among Like Services.

The FCC in its NPRM sought comment on how to interpret the various criteria of a commercial mobile service provider under Section 332(d)(1) of the Act. Section 332(d)(1) of the Act defines a "commercial mobile service" as "...any mobile service...that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as

---

[3]The Conference Report notes that a conforming amendment was added "to the definition in Section 3(n) of the Communications Act of 'mobile service' to clarify that the term includes all items previously defined as 'private land mobile service' and includes the licenses to be issued by the Commission pursuant to the proceedings for personal communications services." Emphasis added. Id. at 496.

specified by regulation by the Commission."[4] Emphasis added.

The PaPUC agrees with most commenters that commercial mobile service should be defined broadly consistent with Congressional intent and to achieve regulatory parity among like services. If the Commission adopts a narrow interpretation of the criteria used to establish the provision of commercial radio service, it will become embroiled in the same controversies Congress sought to eliminate through passage of the Act.[5] It will also be ignoring Congressional intent as evidenced by the legislative history of the Act which overwhelming supports a broad interpretation of the term commercial mobile service for the purpose of achieving regulatory parity between functionally equivalent services.

Like many other commenters, the PaPUC agrees with the FCC's interpretation of the term "for profit", as intending to broadly distinguish between those mobile radio licensees who seek to provide mobile radio service on a for-profit basis to customers as opposed to those licensees who do not. The PaPUC would include

---

[4] Pub. L. No. 103-66, Title VI, §6002(b), 107 Stat. 312, 395 (1993).

[5]Congress recognized that many private carriers have become indistinguishable from common carriers, yet because of their classification as 'private carriers', they are exempt from title II regulation whereas the same services of common carriers are not. House Report, p. 260. (Citing In the Matter of Amendment of part 90, Subparts M and S, 3 FCC Rcd. 1838 (1988), aff'd, 4 FCC rcd. 356 (1988); In the Matter of Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, Notice of Proposed Rulemaking, PR Docket No. 93-38 (released March 12, 1993); Fleet Call, Inc., 6 FCC Rcd. 1538; Telocator Network of America v. FCC, 761 F.2d 763 (D.C.Cir. 1985).

under this definition any provider that offers a mobile service for compensation or on a commercial basis.[6] Under this interpretation government and non-profit public safety services, as well as business that operate mobile radio systems solely for their own private, internal use would be classified as private carriers. There would appear to be little or no benefit in classifying these entities as common carriers, and the PaPUC does not believe that this was the intent of Act. An exception should be made, however, for licensees which operate a system for internal use but make excess capacity available on a for-profit basis.[7] The sale of excess capacity for profit meets at least the first criteria of commercial mobile service.

The PaPUC also agrees with many commenters that, in distinguishing between for-profit and non-profit services, the plain language of the Act and its legislative history support viewing the service as a whole. The language of the Statute refers to whether the "service" is 1) provided for profit, and, 2) makes

---

[6]The PaPUC does not agree with the interpretation of the term "for-profit" advanced by the National Telephone Cooperative Association ("NTCA") (Comments, p. 5) as excluding NTCA members which offer mobile services "directly" rather than through an affiliate from the "commercial mobile service" designation. NTCA member companies offer their services on a commercial basis for compensation. Additionally, it seems unlikely that Congress intended that the subscribers of NTCA member companies be afforded any less protection than the subscribers of other mobile providers.

[7]Accord, Initial Comments of the National Association of Regulatory Utility Commissioners, p. 5, Comments of Telephone & Data Systems, Inc., p. 4; Rochester Telephone Company, p. 3-4.

interconnected service available to the public.[8] The PaPUC also agrees with the New York Department of Public Service[9] and others that the language of Section 332(c) was broadened to specifically resolve the regulatory disparity arising from prior interpretations of Section 332 granting private carrier status as long as the interconnected service itself was not resold for profit.[10]

Consistent with the comments of other parties, the PaPuC believes that the plain language of the statute, together with its legislative history, supports an interpretation of the term "interconnected" which would require that the interconnected service be offered at the end user level. Thus an interconnected service would be one which provided subscribers with access to the public switched network for purposes of sending or receiving messages to or from points on the network. Interconnected service

---

[8] The new criteria are also much broader than the test used under current 47 U.S.C. §322(c)(1), i.e., whether the licensee is selling interconnected telephone service for profit.

[9]Comments of the New York State Department of Public Service, p. 5.

[10]See, In the Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, Mem. Op. and Order (1991), FCC Docket 91-346; 6 FCC Rcd. 6989; and In the Matter of Mobile Radio New England Request for Waiver, Mem. Op. and Order, FCC Docket 92-550, 8 FCC Rcd 349 (1992). The House Report in discussing the fact that private carriers have become indistinguishable from common carriers, specifically references the Fleet Call decision. The House Report also contemplates the reclassification of these carriers under the Act. The House Report states in relevant part: "Section 332(c)(2) largely restates existing subsection 332(c)(2) but clarifies that parties deemed common carriers by virtue of paragraph (a)(6) of this legislation can continue to offer radio dispatch service. The intent of the Committee is not to disturb the ability of private carriers offering dispatch service prior to enactment from continuing to offer such service."

should include both direct and indirect access. Under this interpretation a carrier that interconnects with a commercial mobile service provider would offer "interconnected service" because its messages would be transmitted between its system and the rest of the public switched network.[11]

The PaPUC agrees with many parties that the language of the statute should not be interpreted with reference to the particular technology used.[12] Such an interpretation is likely to result in regulatory disparity for functionally equivalent services. Additionally, the PaPUC agrees with Bell Atlantic that from the subscriber's viewpoint, the important feature of a service is whether messages can be sent to or received from points in the public switched network.[13] How the messages are transmitted, or what technology is used should not affect classification.[14]

The PaPUC agrees with the NYDPS and NYNEX that the FCC's interpretation of "public switched network" for purposes of

---

[11] As noted in the NPRM, this interpretation of the term is also supported by prior FCC precedent. See, Need to Promote Competition for Radio Common Carriers, 2 FCC Rcd 2910 (1987); Report and Order, Establishment of Satellite Systems Providing International Communications, CC Docket 84-1299; 101 FCC 2d 1046 (1985), recon., Mem. & Op. and Order, 61 Rcd 2d 649 (1986), further recon., FCC Rcd 439.

[12] See, inter alia, Comments of the United States Telephone Association, p. 5; Comments of the Bell Atlantic Companies, p. 9; Comments of the New York Department of Public Service, p. 6; Initial Comments of the National Association of Regulatory Utility Commissioners, pps. 16-17; Comments of the Public Service Commission of the District of Columbia, p. 5.

[13] As the FCC notes in the NPRM, this interpretation is consistent with the Intelsat decision.

[14] Comments of the Bell Atlantic Companies, p. 9.

defining a commercial mobile service provider should recognize not only the local and interexchange common carrier switched landline and wireless networks, but the existing and emerging competitive alternatives for the local exchange.[15]

Finally, the PaPUC agrees with most commenters that the interpretation of the phrase "to the public or to such classes of eligible users to be effectively available to a substantial portion of the public" should encompass all services, notwithstanding eligibility limitations, so long as such services are available to a large sector or user group of the public.[16] The PaPUC believes that this interpretation is supported by the legislative history of the Act.[17] Like many other parties, the PaPUC does not support using system capacity as a determinant of whether service is "available to the public", since as several parties point out, the Commission would have to again focus on the technology used and carriers could easily circumvent this standard by altering the

---

[15]NYDPS Comments, p. 6 ("...the definition of 'public switched network' should be written so as to include all networks -- regardless of technology -- that are now or in the future are associated with the provision of switched services to the general public"); NYNEX Comments, p. 9.

[16]The PaPUC agrees that services customized to an individual user's requirements should not be considered available to the public. GTE Comments, p. 7.

[17] The Conference Report notes that the Act adopts the Senate definitions with minor changes. Under the Senate version, the common law requirement that the service be "offered on an indiscriminate basis" is no longer determinative for purposes of determining whether a particular service constitutes common carriage. The Conference Report goes on to state that the definition is to encompass all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public.

technology employed to adjust system capacity as desired.[18]

3. Private Mobile Service

Of the two interpretations of "private mobile service"[19] advanced by the FCC in its Notice, the PaPUC, like many commenters, favors the second under which a mobile service that did not squarely meet the statutory test for a commercial mobile service could still be classified as a commercial mobile service if the FCC determined that it was a "functional equivalent".[20] The PaPUC believes that this interpretation is also supported by the legislative history.[21] In determining whether a service is the "functional equivalent" of a commercial mobile service, the PaPUC again agrees with many commenters that the FCC's current test which requires the FCC to examine both the nature of the services and customer perception of the functional equivalency of those services

---

[18]Accord, Comments of the New York Department of Public Service, p. 7; TDS Comments, p. 9 ("Capacity is a mutable concept based upon the technology employed and the capacity requirements of the service involved.")

[19]Section 332(d)(3) defines "private mobile service" as any mobile service that is not a commercial mobile service (as defined by Section 332(d)(1)) or the "functional equivalent of a commercial mobile service."

[20] Notice, para. 31.

[21] The Conference Report states that the definition of private mobile service was amended to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service. The original House and Senate versions defined the term as merely constituting anything that was not encompasses with the commercial mobile service definition. Thus, rather than to expand upon the definition of "private carriers," the amendment appears to have been to restrict the definition.

would be appropriate for use in this instance.[22] The PaPUC also supports the FCC's suggestion that rather than adopting general rules regarding the test to be used in this context, the FCC should leave the issue of functional equivalence to case-by-case or service-by-service definition or determination.

Finally, the PaPUC supports the FCC's tentative conclusions that both PCP and SMR would be subject to reclassification as commercial mobile services under the Act.[23]

B. Consistent with Congressional Intent, Personal Communications Services Should be Classified as a Commercial Mobile Service to Achieve Regulatory Parity and Commercial Applications Should be Favored.

The FCC has tentatively concluded that no single regulatory classification should be applied to PCS services since there are potential applications of PCS that would constitute private mobile service under the statutory definition.

The PaPUC, consistent with the comments of several other parties, believes that PCS should be classified as a commercial mobile service.[24] Not only is this classification necessary to achieve regulatory parity and to comply with the letter and spirit of the Act, but it is also necessary for administrative and

---

[22] Ad Hoc Telec. Users Comm. v. FCC, 680 F.2d 790 (D.C. Cir. 1982).

[23] Section 6002(c)(2)(B) of the Act specifically grandfathers existing private paging services as private mobile services for three years after enactment. Thus, as the FCC points out in the NPRM, it appears that Congress contemplated the reclassification of these services as commercial mobile services. Notice, at p. 1 and 15.

[24] See, inter alia, NYNEX Comments, p. 18; NARUC Comments, p. 9.

enforcement purposes. That Congress contemplated the classification of PCS as a "commercial mobile service" is overwhelming supported by the legislative history of the Act.[25] Moreover, the FCC itself recognizes that the Act evidences Congressional intent to ensure that PCS services are regulated as commercial mobile services and that under the Act, most personal communications services must be classified as commercial mobile services:

> "As a practical matter, we expect that most broadband and many narrowband PCS services will involve interconnected service to the public or large segments of the public. We believe that a primary objective of Congress in revising Section 332 was to ensure that such services would be regulated as commercial mobile services."[26]

This classification is also necessary to comply with the intent of the Act to achieve regulatory parity among similarly situated services, such as cellular.[27] Rather than leave the regulatory classification of PCS open and allow self-designation, the FCC should classify PCS as a commercial mobile service, but allow private applications or redesignation of portions of the

---

[25]The House Report states in part: "The Committee finds that the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private."

[26] Notice, para. 45.

[27]The PaPUC agrees with the FCC's interpretation that existing common carrier mobile services that provide interconnected radiotelephone service to the public, including cellular, should be classified as a commercial mobile service. See, Notice, para. 41. Given the classification of cellular as a commercial mobile service, the FCC to achieve regulatory parity of like services, must classify PCS as a commercial mobile service.

spectrum when it is shown to be in the public interest.

The PaPUC is sensitive to the concerns of the Commission that there may be applications of PCS that fall within the definition of a private mobile service under the statute and to classify these private mobile service applications as "commercial mobile service" may unnecessarily restrict the potential diversity of applications. However, given the broad definition of a "commercial mobile service" under the Act, it is unlikely that the potential diversity of applications will be limited to any significant degree.

If the FCC finds, however, that self-designation is appropriate for PCS, the PaPUC would suggest use of the first self-designation alternative under which the licensee would be permitted to provide either commercial or private mobile service on a primary basis and the other type of service on a secondary basis only.[28] While alternative 2 would arguably allow for the greatest degree of flexibility, and encourage innovative use of the spectrum to a greater degree, alternative 1 would encourage commercial application of the spectrum to a far greater degree and spectrum allocations would be subject to a much greater degree of certainty. The PaPUC would support the FCC allowing providers under this alternative to provide private applications on a secondary basis,

---

[28]The alternative self-designation scenarios under consideration by the Commission include (1) allowing the PCS licensees to provide one category or the other on a primary basis, with the other type of service permitted only on a secondary basis; or (2) permitting the PCS licensee to provide both commercial and private mobile services on a co-primary basis under a single license.

provided it is found to be in the public interest.

The PaPUC agrees with other commenters that it would be incongruous, however, for the FCC to offer this flexibility to only one class of commercial mobile service provider.[29] The FCC, however, in all cases must establish "filing, and followup reporting requirements that provide sufficient data to enable the Commission to fulfill its statutory duty to independently assess the applications and assure the service proposed/provided actually qualifies as a private MS [mobile service]."[30]

Under either alternative, commercial application of the spectrum should be favored and is in the public interest. In order to ensure the highest use of the spectrum, the FCC should prohibit redesignations from commercial to private carriage unless it is determined to be in the public interest.

C. Forbearance Should Be Analyzed on a Service-by-Service Basis Consistent with Congressional Intent.

Sections 332(c)(1)(A) and 332(c)(1)(C) authorize the Commission to promulgate regulations exempting some or all commercial mobile services from regulation under any of the provisions of Title II other than Sections 201, 202 and 208.

The test for forbearance is contained in Section 332(c)(1)(A):

---

[29]See, Comments of the New York Department of Public Service, p. 9 ("Instead, PCS services should be classified either as commercial mobile or private land mobile service based upon the nature of the service being offered. This same standard also should be applied to existing mobile services.")

[30]NARUC Comments, p. 11.

> "(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (ii) enforcement of such provision is not necessary for the protection of consumers; and
>
> (iii) specifying such provision is consistent with the public interest.

The PaPUC agrees with the FCC's interpretation that these sections authorize the Commission to establish classes or categories of commercial mobile services and to promulgate regulations that vary among classes and individual providers within those classes, as long as functionally equivalent services are treated the same. Given the variety in type and nature of commercial mobile services, the PaPUC believes such an approach would be appropriate and is consistent with Congressional intent.

The FCC has tentatively concluded, however, that the level of competition in the commercial mobile services marketplace is sufficient to permit the FCC to forbear from tariff rate regulation for all commercial mobile services provided to end users.[31] While most LECs and facilities based wireless providers support the FCC's tentative decision, the PaPUC cannot support such a broad-based conclusory decision for all commercial mobile services based upon the limited record in this proceeding. For example, existing private carrier services, such as PCP, which are subject to potential reclassification under the Act, should

---

[31] Notice, para. 62.

probably be subject to the least degree of regulation based upon market conditions. Other classes of commercial mobile services, however, should be subject to a greater degree of regulation depending upon market conditions and other factors.[32] The FCC should independently evaluate each class of commercial mobile service and make findings under the new three-part test relative to each category or type of mobile service provider.

Moreover, the PaPUC believes that the FCC's decision to forbear from tariff regulation of PCS providers before development of the service, is premature. The technological constraints and rate levels of existing wireless services preclude them at the present time from offering any meaningful competition to commercial PCS, as it is currently envisioned. Cellular services and specialized mobile radio services continue to be viewed as luxury items by most residential consumers, and are not yet perceived as substitutes for landline service. While technological advances in the cellular market may ultimately transform it into a viable competitor of PCS, it is not yet at that stage. PCS, on the other hand, is expected to achieve significant penetration levels in the residential marketplace offering viable competition to the local landline provider and replacing the landline provider in many instances. Viable competitors to the landline network should be subject to the full panoply of regulations under title II of the

---

[32]For instance, if the Commission determines that there are grounds to address the concerns of cellular resellers, it might require tariff regulation of wholesale rates initially for this category of commercial mobile service provider.

Communications Act.

The PaPUC also agrees with the New York Department of Public Service that the Commission's regulatory scheme should differentiate between wireless carriers affiliated with dominant providers, and those affiliated with nondominant providers.[33] Affiliates of dominant providers should be subject to equal access interconnection requirements[34] and specific title II requirements including the Commission's current accounting rules[35], and other provisions found to be in the public interest.[36]

The PaPUC agrees with the FCC's tentative conclusion not to forbear from enforcing Sections 206, 207, 209, 216 and 217 of title II. Finally, the FCC in its final rules should reserve the right to subsequently revisit this issue and apply any forborne

---

[33]Comments of the New York Department of Public Service, p. 10. ("It is crucial, however, for the Commission to distinguish between dominant and non-dominant commercial mobile service providers.").

[34]While the PaPUC supports equal access, the record does not support imposition of this requirement on all providers at this time. The PaPUC believes that the Commission should commence an investigation into the technological and economic feasibility of expanding existing requirements to other carriers.

[35]Accord, Comments of the California Public Utilities Commission, p. 8 ("In addition, the CPUC urges the FCC not to forbear from prescribing accounting systems under Section 220 of Title II for dominant providers of commercial mobile services in order to guard against anti-competitive abuses by such providers."); Comments of Bell Atlantic, p. 36 ("Nonetheless, in this docket, the Commission should ensure that the current accounting rules apply to all affiliates of all dominant carriers which provide any type of CMS.").

[36]The PaPUC does not believe the record supports Bell Atlantic's or NYNEX's request for removal of the structural separation requirements under Section 22.901(b) at this time. This issue should be the subject of another proceeding, if necessary. The PaPUC does believe, however, that cellular and PCS should be treated similarly.

sections of title II to commercial providers depending upon market conditions and other factors.

D. Preemption of State Interconnection Policies and Rates Is Not Warranted or Supported by the Act.

The FCC agrees with the other state commissions filing comments in this proceeding that Commission preemption of state interconnection policies and rates is not warranted or supported by the Act.[37]

The test for preemption as set out in Louisiana Public Service Commission v. FCC[38], is as follows:

> Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law (cite omitted), when there is outright or actual conflict between federal state law (cite omitted), where compliance with both federal and state law is in effect physically impossible (cite omitted), where there is implicit in federal law a barrier to state regulation (cite omitted), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law (cite omitted), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress (cite omitted).

Revised Section 332(c)(1)(B) requires the Commission to order a common carrier to interconnect with a commercial mobile service provider on reasonable request. The Act expressly provides that the Commission's new found authority under Section

---

[37]See, Comments of the California Public Utilities Commission, pps. 9-10; Comments of the New York Department of Public Service, pps. 11-15; Comments of the Public Service Commission of the District of Columbia, p. 10; and Initial Comments of the National Association of Regulatory Commissioners, p. 20-22.

[38]476 U.S. 355 (1986).

332(c)(1)(B), however, neither limits nor expands the Commission's authority to already order interconnection pursuant to Section 201 of the Act. Thus, clearly Congressional intent was that the states retain their existing authority over intrastate interconnection matters, and that the FCC's authority over mobile service providers in this regard be no greater than its existing authority pursuant to Section 201 of the Act.

Most parties supporting preemption rely upon Section 332(c)(3) of the Act which preempts state entry and rate regulation of commercial mobile service providers. Preemption is limited, however, under this section to the rates charged subscribers by commercial mobile service providers, and thus reliance upon this section to support preemption of state interconnection rates is misplaced. States are also given express authority under the Act to regulate the other terms and conditions of commercial mobile services. These other terms and conditions would necessarily include interconnection matters.

The PaPUC also agrees with NARUC that "the FCC has not identified any existing state policy concerning intrastate interconnection that negates interstate interconnection rights or explained how all potential state intrastate interconnection policies will conflict with such goals."[39] The PaPUC agrees with the California Public Utilities Commission and NARUC that more favorable or efficient intrastate interconnection arrangements would advance, rather than undermine, federal goals and should be

[39]NARUC Comments, p. 21.

permitted.[40]

For these reasons, the PaPUC does not believe that preemption of state regulation in this area can be justified or is warranted.

E. State Petitions Should be Reviewed on a Case-By-Case Basis and The FCC Should Refrain from Adopting Any Threshold Criteria or Other Requirements At This Time.

Revised Section 332(c)(3)(A) forecloses state rate and entry regulation for commercial mobile services unless a state, upon petition to the FCC, demonstrates that:

> "(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for landline telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The PaPUC agrees with NARUC and the District of Columbia Public Service Commission that the statute is ambiguous on its face since if read literally the second criteria would be superfluous.[41] In other words, if a state is able to show that market conditions

---

[40]Comments of the Public Utilities Commission of the State of California, p. 9; Initial Comments of NARUC, p. 21. Additionally, while the PaPUC supported a federal right to interconnection in its initial comments filed on November 6, 1992, in this proceeding, its support was premised upon the ability of the states to enact complimentary or more expansive rights for intrastate services when in the public interest. ("In addition, the Commission believes that in connection with state regulation, the FCC proposal to grant PCS providers a federally protected right to interconnection with the public switched network, will enhance the LECs' ONA obligations to prevent LEC discrimination." See, PaPUC Initial Comments, pps. 5-6).

[41]Initial Comments of NARUC, p. 21.

fail to protect subscribers, it would never have to meet the second criteria which requires both that market conditions fail to protect subscribers and that the service is a replacement for landline telephone service. This ambiguity can be readily resolved, however, by reference to the legislative history of the Act. The House Report makes clear that Congress contemplated that either condition but not both must be present before a state petition will be authorized, i.e., market conditions fail to protect subscribers from unjust and unreasonable rates or that such service is a replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within such state.[42] While the Conference Report indicates that a Senate amendment was adopted, this amendment did not require that both conditions be met as part of the second prong of the test. Thus, it would be unreasonable and not in accordance with Congressional intent for the FCC to require states to show both failed market conditions and that the radio service acts as a replacement for landline telephone exchange service in all cases.

Notwithstanding the preemptive provisions of Section 332(c)(3), the rest of that Section, together with the legislative

---

[42]Section 332(c)(3)(B) of the House Bill permitted states to petition the FCC for authority to regulate rates where mobile services have become a substitute for telephone service or where market conditions are such that consumers are not protected from unjust and unreasonable rates. Under the Senate Amendment, a state may obtain regulatory authority if it demonstrated that commercial mobile service is a substitute for landline telephone exchange service for a substantial portion of the communications within such state. The Conference Report amended this language to "a substantial portion of the telephone landline exchange service."

history of the Act, make clear that a paramount and overriding concern of Congress is the states ability to continue to ensure the availability of universal service.

> "Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates." Emphasis added.

The PaPUC believes that Congress in including this provision specifically recognized that PCS, as currently envisioned, is expected to be a direct competitor or replacement for traditional landline local telephone service.[43] Thus Congress recognized the vital role PCS services will play in the future in the provision of intrastate communications service, and the substantial interest of states in ensuring that universal service concerns are met.

With this in mind and the other direction offered in the legislative history of the Act, the PaPUC does not believe that Congress intended the FCC to adopt threshold criteria which a state must meet before filing a petition pursuant to this section. The potential scenarios brought about by the interplay of wireless and landline services in the future are likely to vary to a considerable degree from state to state, and accordingly universal service concerns are likely to vary considerably as well. The

---

[43]Moreover, the Conference Report amended this Section to clarify that universal service can be provided by any provider of telecommunications service.

PaPUC, therefore, urges the Commission to refrain from adopting any threshold criteria before states may file petitions pursuant to Section 332(c)(3)(a). The effect of such criteria would result in treating all states and markets the same under the Act. Such an interpretation of the Act is not supported by the plain language of the statue nor is it in the public interest.

The PaPUC also opposes the adoption of any hard and fast criteria at this time which would apply to state petitions that are eventually filed with the FCC. The PaPUC believes that state petitions pursuant to Section 332(c)(3)(a) should be reviewed on a case-by-case basis. The PaPUC believes that the criteria of the statute are clear and given the paramount state interest involved, the FCC should allow states to set forth in their petitions any factors deemed relevant to the alternative tests set forth in the Act.[44] The PaPUC also concurs with the comments filed by NARUC that any criteria used should not be deemed to be exclusive or exhaustive.[45]

Additionally, The PaPUC suggests that the FCC recognize and give substantial weight to state legislative mandates because of the significant state interest of ensuring universally affordable and available intrastate communications services.

The PaPUC urges the Commission to reject the

---

[44]It is highly unlikely that most states will petition for authority under this Section, unless the wireless service is acting as a substitute for landline service and universal service considerations are present.

[45]Initial Comments of NARUC, p. 7.

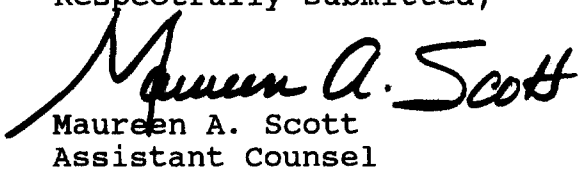
unreasonable conditions suggested by several parties in an apparent attempt to thwart state oversight in this area. For instance, McCaw Cellular Communications suggests that the Commission should grant a state petition only if the state can demonstrate through empirical evidence that market conditions vary significantly from the national norm, the existence of anticompetitive behavior and "that ad hoc state regulation is a better means of protecting consumers than a uniform Federal policy."[46] Several parties suggest that the Commission establish a strong presumption against the imposition of state regulation. Yet others would require the "State" itself to file a petition under this Section, and would require the state to submit a copy of any proposed rules to the Commission for review. The PaPUC respectfully submits that none of these criteria is supported by either the Act or its legislative history and must be rejected by the Commission as an attempt to undermine legitimate state interests in this area.

In summary, the adoption of threshold criteria before states may petition for authority to regulate rates under Section 332(c) is not supported by the Act or its legislative history. Determinations by the Commission under Section 332(c) must be done on a case-by-case basis and any criteria adopted by the Commission should not be deemed exclusive or exhaustive on the issue. The FCC should reject the suggestions of some parties that would impose overly burdensome and unwarranted evidentiary standards on states given the significant state interest involved. Finally, consistent

[46]Comments of McCaw Cellular Communications, Inc., pps. 23-24

with the statute, the FCC should recognize that a paramount concern of Congress was the state's ability to ensure the continuation of universal telephone service.

Respectfully submitted,



Maureen A. Scott
Assistant Counsel

Veronica A. Smith
Deputy Chief Counsel

John F. Povilaitis
Chief Counsel

Counsel for the Pennsylvania
Public Utility Commission

P.O. Box 3265
G-28 North Office Building
Harrisburg, PA 17105-3265
(717) 787-4945

Dated: November 22, 1993